IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-492

ROBERT MICHAEL FUNGAROLI,

Appellant

V.

JUDITH DIANE FUNGAROLI,

Appellee

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPORTS OF OPINIONS

Opinion of North Carolina Court of Appeals, 70 N.C.App. 397, 252 S.E.2d 849

Order of North Carolina Supreme Court dismissing appeal for lack of substantial constitutional question, 297 N.C. 452, 256 S.E.2d 805

JURISDICTION

This action is an appeal from a holding by the North Carolina Court of Appeals and North Carolina Supreme Court that a statute is constitutional under the Constitution of the United States of America. This appeal is brought forward under 28 U.S.C. sec. 1257 (2) and 1257 (3). The order of the District Court of Forsyth County is dated March 1, 1978; the opinion of the North Carolina Court of Appeals is dated March 20, 1979; the order of the North Carolina Supreme Court is dated June 13, 1979. Notice of Appeal was filed with the North Carolina Supreme Court on

September 4, 1979. Appeal was filed with the United States Supreme Court on September 11, 1979. Probable jurisdiction was noted January 14, 1980.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment VI of the Constitution of the United States of America:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV, §1, of the Constitution of the United States of America:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

North Carolina General Statute §50-16.8 (Volume 2A, page 852)

§50-16.8. Procedure in actions for alimony and alimony pendente lite. -- (a) The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this action.

(b) Payment of alimony may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from bed and board; or

(2) Upon application of the dependent spouse in a separate action instituted for the purpose of securing an order for alimony without divorce; or

(3) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, or a proceeding for alimony without divorce, instituted by the other spouse.

(c) A cross action for divorce, either absolute or from bed and board, shall be allowable in an action for alimony without divorce.

(d) Payment of alimony pendente lite may be ordered:

(1) Upon application of the dependent

spouse in an action by such spouse for absolute divorce, divorce from bed and board, annulment, or for alimony without divorce; or

(2) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, annulment, or for alimony without divorce, instituted by the other spouse.

(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof; but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessary.

(f) When an application is made for alimony pendente lite, the party shall be

heard orally, upon affidavit, verified pleading, or other proof, and the judge shall find the facts from the evidence so presented.

(g) When a district court having jurisdiction of the matter shall have been established, application for alimony pendente lite shall be made to such district court, and may be heard without a jury by a judge of said court at any time.

(h) In any case where a claim is made for alimony without divorce, when there is a minor child, the pleading shall set forth the name and age of each such child; and if there be no minor child, the pleading shall so state.

QUESTION PRESENTED

Whether due process guarantees a litigant the right of notice and an opportunity to be heard and, further, whether North Carolina General Statute 50-16.8(e) (infra) which, inter alia, provides that

a judge may dispense with notice requirements and due process upon a finding that a litigant, i.e., a supporting spouse within the definition of North Carolina domestic relations law, has abandoned the State and whether the Court may then proceed to conduct a hearing affecting substantial property rights without notice to the alleged abandoning or fleeing spouse or to his attorney of record who has already made a general appearance in the case.

STATEMENT OF THE CASE

In the instant case, appellant filed a custody action under N.C.G.S. 50-13, et. seq., on December 21, 1977. (A p 3) On February 18, 1978, the trial court entered an ex parte order allowing the appellee specific visitation privileges. (A p 12) On February 24, 1978, the trial court entered an ex parte order that the

plaintiff show cause, if any there be, as to why he should not be punished as for contempt for violation of the order of February 18, 1978. (A p 20)

On February 28, 1978, the appellee filed answer and counterclaim for custody of the minor child pursuant to N.C.G.S. 50-13, et. seq., and for alimony pursuant to N.C.G.S. 50-16.1, et. seq. (A p 22) The next day, on March 1, 1978, the appellee filed a motion for alimony pendente lite and attorney's fees (A p 35); and a hearing was conducted on the same day on said motion, and appellant was ordered to pay temporary alimony. At the time of the hearing ordering temporary alimony, the answer and counterclaim of appellee had not been served upon appellant or his attorney of record. Furthermore, at the time of the temporary alimony hearing, neither the appellant nor his counsel of

record had been served with any notice of said hearing. The appellant appealed from this order and contended that the beforementioned constitutional rights under the Constitution of the United States and the Constitution of North Carolina were violated in that said appellant was not given proper notice and/or opportunity to be heard under the circumstances; that essential elements of "due process of law" and "law of the land" are notice and opportunity to be heard or defend in accordance with established rules which do not violate fundamental rights.

On March 6, 1978, a hearing was conducted on the ex parte show cause order arising out of the ex parte order allowing the appellee specific visitation privileges. Neither the appellant nor his counsel was given any notice of the ex parte order allowing said appellee specific visitation

privileges. The appellant appealed from the order entered March 6, 1978, finding him in contempt of said ex parte specific visitation privileges order and contended that his constitutional rights under the Constitution of the United States and Constitution of North Carolina were violated in the same manner and respect as stated in the preceding paragraph.

These constitutional issues were timely raised in the appeal to the North Carolina Court of Appeals. The appellant contends that the decision and order of the North Carolina Court of Appeals has not addressed itself in any manner to the constitutional issues as presented and that, if it is determined that the North Carolina Court of Appeals did address itself to said constitutional issues, the decision of the North Carolina Court of Appeals has erroneously ruled upon said issues.

SUMMARY OF ARGUMENT

I.

North Carolina General Statute §50-16.8(e) is unconstitutional as a denial of due process of law because it enables a court, in certain circumstances, to enter a decree of alimony pendente lite against a supporting spouse without prior notice to the spouse or a meaningful opportunity to be heard. The fundamental guarantees of due process of law are that an individual cannot be deprived of a property interest by adjudication without first being notified and provided a meaningful opportunity to be heard. N.C.G.S. 50-16.8(e) ignores that injunction by dispensing with notice in any case where the dependent spouse alleges that the supporting spouse has abandoned the dependent spouse and left the state, or is in parts unknown, or is disposing of assets to defeat the claim of the dependent spouse for alimony. Failure

to give prior notice and opportunity for hearing, even in these situations, is not justified by any governmental or general public interests. Instead, it actively operates to the detriment of fair and informed decision-making. Finally, the infirmities of the statute are not cured by post-decree modification proceedings because the burden of proof is thereby shifted to the supporting spouse, and the burden of initiating the modification proceeding is placed on the supporting spouse as well.

II.

Even if N.C.G.S. 50-16.8(e) is a generally valid exercise of legitimate state power, its application to the appellant in this case is nevertheless unconstitutional as a denial of due process of law. Due process requires that litigants be provided reasonable notice in the cir-

cumstances, and in this case it would have been eminently reasonable to notify appellant's counsel of record or to notify appellant, whose location was known to the court and to the adverse parties.

ARGUMENT

I. N.C.G.S. 50-16.8(e) AUTHORIZING AN AWARD OF ALIMONY PENDENTE LITE WITHOUT ACCORDING TO THE SUPPORTING SPOUSE PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD, UPON MERE ALLEGATION THAT THE SUPPORTING SPOUSE HAS ABANDONED THE DEPENDENT SPOUSE AND LEFT THE STATE, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

North Carolina provides for alimony pendente lite, or temporary alimony, to help support a dependent spouse through the course of litigation affecting marital and familial relationships. N.C.G.S. 50-16.3(a)(2) provides that a dependent spouse is entitled to alimony pendente lite when he or she establishes, by oral testimony,

affidavit or verified pleading, that he or she has not sufficient means to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

N.C.G.S. 50-16.8 governs the procedure whereby a dependent spouse may apply to the court for alimony pendente lite. N.C.G.S. 50-16.8(e), the statutory provision at issue here, provides with respect to notice to the supporting spouse upon application for alimony pendente lite:

> "(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof, but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessay."

The district court employed this provision to justify the total lack of prior notice to appellant of the pending

motion for alimony pendente lite and the ex parte hearing held thereon. (A p 40) Accordingly, appellant was directed to pay into the court for appellee's benefit $100.00 per week until further order of the court (A p 43), without having ever been notified of the hearing nor given an opportunity to defend. Insofar as N.C.G.S. 50-16.8(e) permits a court to order alimony pendente lite against a supporting spouse without first giving that spouse reasonable advance notice and an opportunity to be heard, appellant maintains that the statute is unconstitutional as working a deprivation of property interests without due process of law.

A. <u>The Statutory Direction Dispensing With Notice Deprives the Supporting Spouse of a Meaningful Opportunity to be Heard</u>.

For well over a century it has been a fundamental truth in our law that "[p]arties whose rights are to be affected are entitled

to be heard; and in order that they may enjoy that right they must first be notified." Baldwin vs. Hale, 68 U.S. (1 Wall.) 223, 233 (1864). See Grannis vs. Ordean, 234 U.S. 385, 394 (1914). The action of state courts in imposing penalties or depriving parties of their substantive rights without providing adequate notice and an opportunity to defend is a denial of due process. Shelley vs. Kraemer, 334 U.S. 1 (1948).

Though questions regarding due process of law frequently narrow to what process is due in particular circumstances, e.g., Morrissey vs. Brewer, 408 U.S. 471, 481 (1972), there can be no question that the most rudimentary guarantees of due process require some form of notice and an opportunity to be heard. Indeed, as this Court observed in Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950):

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id., at 313.

While it is abundantly clear that due process tolerates variances in the form of a hearing and the notice of hearing, "the Court has traditionally insisted that, whatever its form, opportunity for hearing must be provided before the deprivation at issue takes effect." Fuentes vs. Shevin, 407 U.S. 67, 82 (1972). See Wisconsin vs. Constantineau, 400 U.S. 433, 437 (1971).

These most basic of due process guarantees--notice and hearing--have been applied to a myriad of procedures, some of which are only quasi-judicial at best. E.g., Sniadach vs. Family Finance Corp.,

395 U.S. 337 (1969)(prejudgment garnishment of wages); Goldberg vs. Kelly, 397 U.S. 254 (1970)(termination of state welfare benefits); Wolff vs. McDonnell, 418 U.S. 539 (1974)(intra-prison disciplinary procedures); Bell vs. Burson, 402 U.S. 535 (1971)(suspension of an individual's driver's license); Armstrong vs. Manzo, 380 U.S. 545 (1965)(adoption proceedings); Stanley vs. Illinois, 405 U.S. 645 (1972) (proceedings to remove an unwed father's custody over children). These are but a few of the procedures to which prior notice and hearing have been deemed by the Court to be essential to fair adjudication. It makes obvious sense, in all but a few cases, to require that notice and hearing be "granted at a meaningful time and in a meaningful manner," Armstrong vs. Manzo, supra, at 552, and this means at a time when the deprivation can either be pre-

vented or justified by resort to objective criteria. See, L. Tribe, American Constitutional Law, §10-14, at 544(1978).

Certainly a supporting spouse has a cognizable interest in being notified of a motion for alimony pendente lite, as well as an interest in asserting his or her position in the matter. This is so for the simple reason that an order for alimony pendente lite affects a deprivation of a property interest encompassed within the protection of the Fourteenth Amendment. Aside from the fact that an order to pay alimony is a personal judgment, see Keezer, Marriage and Divorce, §592, at 658 (3rd ed., 1946), it also acts to deprive the supporting spouse of an interest in particular property, viz., the wages and other income the supporting spouse receives. Wages have been identified as a particular type of property requiring special due process protection.

Sniadach vs. Family Finance Corp., supra, at 340. See North Georgia Finishing, Inc. vs. Di-Chem, Inc., 419 U.S. 601, 611 n.2 (1975)(Powell, J., concurring). Deprivation of an interest in wages is a deprivation of an interest in a basic necessity of life and must be accompanied by the appropriate procedural safeguards. Cf., Goldberg vs. Kelly, supra, at 264.

An order of alimony, whether it has effect only during the course of litigation or is of a more permanent nature, is a taking, and a rather obvious one at that. "Where the taking of one's property is obvious, it takes no extended argument to conclude that absent notice and a prior hearing, [such a deprivation] violates the fundamental principles of due process." Sniadach, supra, at 342. The concern here should be not that an order of alimony has been entered, but that it was entered

without notice and opportunity for the appellant to be heard. None would claim that the Constitution denies the state the power to enforce the obligations owed by a supporting spouse to a dependent spouse. Yet that is not the question here. Rather the question is whether enforcing those obligations by judicial means, without prior notice and hearing, is constitutionally defensible. See Stanley vs. Illinois, supra, at 652. N.C.G.S. 50-16.8(e) ignores the injunction mandating notice and opportunity to be heard, with the inevitable result that a supporting spouse is deprived of a significant interest in livelihood without ever having been notified or heard on the matter.

Though it is true that a hearing--albeit ex parte--was held before the court ordered appellant to pay alimony pendente lite (A p 1 "Relevant Docket Entries"), the hearing was meaningless to appellant

because neither he nor his attorney had knowledge of the hearing and no effort whatsoever was made to inform them. A "hearing," in its constitutional and common meaning, necessarily presupposes the presence of all persons whose rights or duties are subject to adjudication, or at least a meaningful opportunity to be present. It takes no extended argument to recognize that notice has no significance in its own right; its significance lies in the fact that it informs parties of an upcoming hearing and enables them to marshal the facts and prepare a case for the hearing. See Memphis Light, Gas & Water Div. vs. Craft, 436 U.S. 1, 14 (1978). Therefore, providing a hearing without first notifying adverse parties transforms the hearing into an empty formality. The meaningful opportunity to be heard, a guarantee so often echoed by this Court, Grannis

vs. Ordean, supra, at 394, "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane vs. Central Hanover Bank & Trust Co., supra, at 314. See Armstrong vs. Manzo, supra, at 550.

The need for notice to appellant in the instant case existed notwithstanding the fact that he was the plaintiff in the underlying case for custody of the couple's child and notwithstanding the fact that the parties were involved in continuing litigation. First, alimony pendente lite is not granted automatically; it must be applied for, so the supporting spouse should not be charged with constructive knowledge that at some point he will have to pay alimony pendente lite. Second, since it is the dependent spouse who must initiate

the proceedings for alimony pendente lite, the proceedings are essentially ancillary to the underlying action, and with respect to those proceedings, it is the dependent spouse who fulfills the role of plaintiff. Therefore, the supporting spouse should be notified of the dependent spouse's actions. Third, applications for alimony pendente lite, as in this case, often are not made until some time after the underlying action is commenced. In this case it was approximately two months after the suit was commenced that appellee moved for alimony pendente lite. (A pp 3, 22, 35) It is not as if the motion was made immediately following commencement of the suit, when the supporting spouse could reasonably be expected to take independent notice of the motion. Nor did any of appellee's responsive pleadings convey any indication that she contemplated applying for alimony

pendente lite. (A pp 10-21) Thus there was no way that appellant could have learned of the motion for alimony pendente lite without being duly notified either by the appellee or by the court. But as the trial court concluded, N.C.G.S. 50-16.8(e) nevertheless permitted the appellee and the court to dispense with any notice whatsoever. (A p 39)

Having established then that appellant was entitled under due process to notice and opportunity to be heard, that it would be unreasonable to impose any type of constructive notice upon him, and that the statute denied him any notice whatsoever, it is clear that N.C.G.S. 50-16.8(e) is unconstitutional as a denial of due process of law unless a state interest of overriding significance can be shown to justify the failure to give notice. Appellant will next address that argument.

B. No Government or General Public Interests Justify Awarding Alimony Pendente Lite Without According to the Supporting Spouse Prior Notice and a Reasonable Opportunity to be Heard.

1. N.C.G.S. 50-16.8(e) does not promote any government interests to the point where prior notice and hearing may be dispensed with.

Undoubtedly there are "extraordinary situations" which justify postponing the opportunity to be heard until after the deprivation. Boddie vs. Connecticut, 401 U.S. 371, 379 (1971). This Court has endeavored to identify those situations where such procedures are justified:

> "First, in each case, the seizure has been directly necessary to secure an important or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." Fuentes vs. Sheven, supra, at 92.

The Court has permitted summary seizures and deprivations to collect the internal revenue of the United States, Bob Jones University vs. Simon, 416 U.S. 725 (1974); Phillips vs. Commission, 283 U.S. 589 (1931), to meet the needs of a national war effort, Central Union Trust vs. Garvan, 254 U.S. 554 (1921), to seize articles used in crime, Calero-Toledo vs. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), to protect the public from misbranded drugs, Ewing vs. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950), and contaminated food, North American Storage Co. vs. Chicago, 211 U.S. 306 (1909), and to protect public institutions from serious

disruption, Goss vs. Lopez, 419 U.S. 565 (1975).

Alimony pendente lite does not present an extraordinary situation justifying a total abdication from due process notice and hearing requirements. Ordering a supporting spouse to pay alimony pendente lite does not further government or public interests to the point where prior notice and hearing are no longer required. The dependent spouse's interest is purely private, having no direct relationship to governmental or public needs. It is certainly no more clothed in the general public interest than was the repossession of personal property to pay a private debt, which was held not to be a sufficient government or public interest in Fuentes vs. Shevin, supra, at 92-93.

Moreover, even though the statute dispenses with notice only in those situations where there is at least an ostensible need for prompt action, it cannot seriously be contended that dispensing with prior notice is necessary to avert the potential catastrophic consequences that were involved in cases like Ewing and North American Storage, where failure to take immediate action could have posed serious health hazards to the general public. See Fuentes, supra, at 93. Actually, the most serious consequence which would result from requiring prior notice before a court orders temporary alimony would be a few days' delay before the supporting spouse is ordered to pay alimony. That this consequence is not of sufficient moment to justify dispensing with notice can be readily seen by reference to the fact that in all cases but those enumerated, N.C.G.S. 50-16.8(e) requires five days' prior notice. Furthermore, an order of alimony will have no practical effect until the supporting spouse receives it,

and if he has had no prior notice, it could be a number of days before the supporting spouse learns of the order. In short, even though alimony pendente lite has been characterized as a matter of urgency by the North Carolina courts, e.g., Williams vs. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964), the simple fact is that delay is built into the system. Therefore, the few days' delay that might result from giving prior notice even in those cases where prompt action might otherwise be deemed necessary simply does not pose such a serious consequence as would justify a failure to give prior notice. Such a consequence, when weighed against the deprivation visited upon the supporting spouse, simply does not measure up to the extraordinary situations which traditionally have justified postponement of notice and hearing.

2. By dispensing with prior notice, the State spites its own goals of fair and effective adjudication.

Both the state and the individual share a fundamental interest in avoiding arbitrary determination. Goldberg vs. Kelly, at 266. The touchstone of due process is the protection of the individual against arbitrary action of government, Dent vs. West Virginia, 129 U.S. 114 (1889), and the most effective protection against arbitrary determination which affect substantial rights is prior notice and an opportunity to be heard. As this Court observed in Fuentes, the purpose of prior notice and the right to be heard "is to protect [the individual's] use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property." Id., at 81.

Thus arises the major objection to ex parte proceedings to determine personal obligations and rights in property. While ex parte proceedings seem to be rife in domestic relations cases, their desirability is questionable where alimony is concerned. In cases where this Court has upheld the validity of ex parte orders of divorce for purposes of full faith and credit, it has refused to do so where ex parte orders of alimony were entered without the adverse party having been properly notified or appearing voluntarily. E.g., Estin vs. Estin, 334 U.S. 541 (1948). See also, May vs. Anderson, 345 U.S. 528 (1953). While appellant does not contend that the trial court was without jurisdiction over him, it is plain that any order of the court which adjudicates personal obligations should be made only where all interested parties have been given a reasonable

opportunity to protect their interests. Mullane vs. Central Hanover Bank & Trust Co., supra, at 314.

It is instructive to note that while virtually every state provides for alimony pendente lite by statute, only North Carolina specifically dispenses with prior notice without providing some specific opportunity for hearing. A numer of states[1] have adopted or patterned their own statutes after §304 of the Uniform Marriage and Divorce Act (Brief App.A,p 1a), which permits temporary orders without prior notice only upon a showing of irreparable injury, similar to the showing required to secure a temporary restraining order. §304 (b), (c) of the Uniform Mar-

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[1] E.g., C.R.S. §14-10-108 (Colorado); D.C.A. §1509(b) (Delaware); I.A.S. §501(6) (Illinois); Mont. Code §40-4-106 (Montana); N.R.S. §42-357 (Nebraska); R.C.U. §26.09.060 (Washington)

riage and Divorce Act. In addition, the Act provides methods whereby such orders may be dissolved §304 (d), (f)(2). Other states require prior notice and hearing in all cases of temporary alimony,[2] and still others require that if no prior notice and hearing is given, a hearing must be provided promptly after the order is entered to determine its accuracy.[3] Finally, several state statutes are silent as to

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[2]E.g., G.C.A. §§30-202, 30-213 (Georgia); I.S.A. §31-1-11.5-7 (Indiana); I.C.A. §598.11 (Iowa); Mo. Ann. Stats. §452.315(1) (Missouri); N.R.S. §125.040 (Nevada); N.M. Stats. §22-7-6(a) (New Mexico); V.S.A. §675 (Vermont); W.V.C. §48-2-13 (West Virginia); W.S.A. §247.23 (Wisconsin). See BNA, Family Law Rpts., Reference File, §401 et. seq.

[3]E.g., R.S.A. §458:16 (New Hampshire); N.D.Code §14-05-23 (North Dakota); O.S.A. §1276 (Oklahoma). See BNA Family Law Rpts., Reference File §401 et. seq.

prior notice,[4] which may form a basis for assuming that applications for alimony pendente lite are to be served on opposing parties just as are other pleadings and motions. The short of it is that ex parte orders of alimony are not particularly desirable and should not be encouraged except in those rare situations were circumstances require them.

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[4]E.g., Ala. Code §30-2-50 (Alabama); Alaska Stats. §09.55.200 (Alaska); A.R.S. §25-315B (Arizona); G.S.A. §46-50 (Connecticut); D.C. Code §16-911 (District of Columbia); F.S.A. §61.071 (Florida); Idaho Code §32-704 (Idaho); K.S.A. §60-1607 (a)(3) (Kansas); K.R.S. §403.160 (Kentucky); R.S.A. §722 (Maine); Mass. Ann. Laws c. 208, §17 (Massachusetts); M.S.A. §552.13 (Michigan); M.S.A. §578.14 (Minnesota); N.J.S.A. §2A:34-23 (New Jersey); McKinney's Cons. Laws §236 (New York); O.R.S. §107.095 (Oregon); P.S.A. §46 (Pennsylvania); G.L. §15-5-19 (Rhode Island); S.C. Code §20-3-120 (South Carolina); S.D. Laws §25-4-38 (South Dakota); T.C.A. §36-820 (Tennessee); Utah Code §30-3-33 (Utah); Code of Va. §20-103 (Virginia); W.S.A. §20-2-111 (Wyoming); see BNA, Family Law Rpts., Reference File §401, et. seq.

Ex parte proceedings, of the type envisaged by N.C.G.S. 50-16.8(e), cannot be expected to promote fair determinations. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Joint Anti-Fascist Refugee Committee vs. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurther, J., concurring) Ex parte proceedings to determine appropriate temporary support spite the goals of fair and accurate decision making. North Carolina courts have expressed the policy that alimony determinations, whether permanent or pendente lite, are to be based on the dependent spouse's needs and the supporting spouse's ability to pay. Brady vs. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968). Indeed, N.C.

G.S. 50-16.5(a) requires that determination of alimony be made "having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." And North Carolina courts require the trial judge to follow the requirements of the statute in making alimony determinations. E.g., Beall vs. Beall, 290 N.C. 699, 228 S.E.2d 407 (1976).

Yet, despite these admonitions, the facts of this case demonstrate that such informed determinations often cannot be made in ex parte proceedings. The only information before the court when it ordered alimony pendente lite on March 1, 1978, was appellee's affidavit which accompanied the motion for alimony pendente lite (A pp 29-34) and the statements in appellee's answer and counterclaim (A pp 22-28). Such ex parte allegations

> "are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation." Fuentes, supra, at 83.

Nowhere in any of the documents filed with the trial court is there anything more than appellee's allegations of need, nor is there any indication of appellant's ability to pay $100.00 per week in temporary alimony. (A pp 40-41). In fact, it would appear that this figure was arrived at, not on the basis of evidence, but on the basis of the amount specifically requested by appellee. (A p 35) Providing appellant with a reasonable opportunity to appear at the hearing, either personally or

through counsel, would have enabled the trial court to make a more informed judgment.[5]

A final consideration is that notice and opportunity to be heard must be granted at a time when the deprivation can be prevented, or when it can be justified by objective criteria. Fuentes, supra, at 81; Armstrong vs. Manzo, supra, at 552. Alimony already paid or accrued, unlike personal property consisting of goods, compare Mitchell vs. W. T. Grant Co., 416 U. S. 600 (1974), is in most cases something that cannot be returned to the supporting spouse in the event it is later determined that the order was erroneous. Coupled

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[5] Of course if a supporting spouse is notified of the hearing and chooses not to respond, he cannot thereafter be heard to complain about the order, and the court would be justified in arriving at a figure based solely on the allegations of the dependent spouse. See Windsor vs. McVeigh, 93 U.S. 274,278(1876). But such is not the case here.

with the increasingly high risks that ex parte alimony proceedings will lead to determinations which are based on conjecture rather than fact, due process requires that notice and opportunity to be heard be provided after the order for alimony is entered. Moreover, even if we were to assume that erroneous alimony awards could be totally cured by modification (and appellant does not--see Point I(c), infra), this Court has not "embraced the general proposition that a wrong may be done if it can be undone." Stanley vs. Illinois, supra, at 647. And the rule is all the more clear when the wrong in all likelihood cannot be totally undone.[6]

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[6]Cases such as Ingraham vs. Wright, 430 U.S. 651 (1977),are inopposite to the instant case because of the general irreversibility of alimony payments or accruals which have occurred pursuant to an erroneous order of alimony pendente lite. In Ingraham, the Court held that notice and hearing need not precede administration of

Thus the existence of important personal interests of the appellant in not being required to pay alimony, together with the risks of arbitrary determinations in ex parte proceedings, weigh heavily against the relatively minor inconvenience to the appellee that would result from requiring prior notice of a motion for alimony pendente lite even where the supporting spouse has allegedly abandoned the spouse and left the state.[7]

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corporal punishment in schools, reasoning that the risks of arbitrary punishment were minimal because of a traditionally low incidence of abuse, openness of schools and common law safeguards, Id., at 682. Such considerations do not apply to ex parte alimony orders which present much more significant dangers of error.

[7]Interestingly, the trial court in this case had no demonstrable basis for finding as a matter of fact that appellant had abandoned the appellee. Neither appellee's answer and counterclaim nor the affidavit attached to the motion for alimony pendente lite contained any allegations or supporting facts of abandonment. See Appendix pp 29-34, 37, 38.

Against the appellee's interest in receiving alimony pendente lite without delay must be balanced the appellant's interest in insuring that permanent deprivation of his property via alimony is not based on arbitrary considerations. The balance tips decidedly in favor of appellant, since he stands much more to lose from lack of notice than appellee stands to gain by conducting an ex parte hearing. Accordingly, N.C.G.S. 50-16.8(e) cannot be justified as necessary to promote interests which are more important than appellant's interests.

C. Ability to Modify or Vacate an Order of Alimony Pendente Lite Does Not Cure the Unconstitutionality of Failure to Give Prior Notice to the Supporting Spouse.

1. Modification proceedings would require appellant to assume burdens of proof that he would not have had to assume if he had been

notified of the hearing.

In Armstrong vs. Manzo, 380 U.S. 545 (1965), this Court invalidated as unconstitutional a Texas adoption proceeding because the natural father of the child was not given prior notice of the proceedings. The Court further held that a hearing subsequently granted to the natural father did not cure the constitutional defect since he was forced to assume burdens of proof which, had be been accorded notice in the first place, would have rested upon the parties seeking the adoption. Id., at 550-552. The Court stated:

> "Had the petitioner [the natural father] been given the timely notice the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. . . . Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed.
>
> Instead, the petitioner was faced on his first appearance

in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' Speiser vs. Randall, 357 U.S. 513, 525. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution." Id., at 551. (Citation omitted) (Emphasis Added)

Precisely the same situation exists in the instant case. The only means whereby appellant can challenge the order for alimony pendente lite, other than by direct appeal, is by a separate proceeding to modify or vacate the order pursuant to N.C.G.S. 50-16.9. Subsection (a) of that statute provides that the party moving

for modification must show changed circumstances as the basis for modification,[8] and North Carolina courts have consistently held that the burden of proving changed circumstances rests with the party seeking the modification. E.g., Robinson vs. Robinson, 10 N.C.App. 463, 179 S.E.2d 144 (1971).

But the burden in the initial proceeding to determine alimony pendente lite is on the dependent spouse to prove that he or she is entitled to alimony pendente lite. N.C.G.S. 50-16.3. Rickert vs. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972). Thus the failure to give notice to appellant prior to the initial hearing to deter-

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[8] N.C.G.S. 50-16.9(a) provides: "An order of a court of this State for alimony or alimony pendente lite whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of change circumstances by either party or anyone interested."

mine alimony pendente lite placed the burden of proof on him to overcome the adverse decree, a burden which he would not have had to shoulder had he been given timely notice in the first place. Because the opportunity to be heard must be granted at a meaningful time and in a meaningful manner, there must be a mechanism whereby the decree can be set aside and the case considered anew. Only that would restore the appellant to the position he would have occupied had due process of law been accorded to him in the first place. Armstrong vs. Manzo, supra, at 552.

2. Modification proceedings cannot undo the harm caused by the initial deprivation without prior notice.

Aside from the shift in burdens of proof, modification proceedings do not present the type of "prompt post-deprivation

hearing" contemplated by the Court as required by due process when prior notice and hearing cannot be reasonably accorded to a litigant. See Mitchell vs. W. T. Grant Co., 416 U.S. 600 (1974). This is so because modification is not an automatic procedure for use by a spouse against whom an adverse decree has been entered.[9] Not only must the supporting spouse bear the burden of proving facts entitling him to a modification, but he must also bear the burden of initiating the proceedings to challenge the validity of the adverse

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[9] It is interesting to note that North Carolina requires ex parte orders restraining a parent from abusing his or her children or a spouse from abusing the other spouse to be followed by an automatic hearing within ten days. N.C.G.S. 50B-2(b). Certainly the requirement of a prompt hearing in such cases where actual physical harm to a spouse or children is threatened mandates the provision of similar safeguards where alimony is concerned.

decree. This added burden makes the initial deprivation without prior notice and opportunity to be heard even more onerous. Cf., North Georgia Finishing, Inc., vs. Di-Chem, Inc., 419 U.S. 601, 613 (1975) (Powell, J., concurring).

A further problem with modification as the sole remedy for ex parte orders of alimony is that it offers prospective relief only. Alimony which has already accrued or been paid to the dependent spouse is ordinarily not recoverable and is not considered in modifying or vacating the decree itself, so the supporting spouse is in the position of having suffered a deprivation without having an adequate remedy therefor. It would seem that even the most rudimentary procedural safeguards would require something more. In keeping with the admonition that a litigant must be offered a meaningful opportunity to effectively

counter erroneous or arbitrary judicial determinations which deprive him of property interests, Mullane, supra, at 314, and where for some reason prior notice and hearing are not practicable or justified, minimum due process standards require the use of a post-deprivation procedure that will afford a complete remedy to the party who has been wrongfully deprived of property interests. In cases such as the instant case, this means a hearing that is automatic, and that requires the dependent spouse to prove the allegations that formed the basis of the trial court's decree in the prior ex parte proceeding.

Modification proceedings under N.C. G.S. 50-16.9 do not provide the cure for the constitutional defects inherent in any procedure for alimony pendente lite wherein the supporting spouse is not notified nor given a meaningful opportunity to present

his case. Modification proceedings are not automatic, nor do they require the dependent spouse to prove entitlement. Since subsequent hearings are supposed to serve the same purposes of a hearing with respect to wrongful deprivations and are not mere formalities, due process can be served only when such hearings are conducted in the same manner and with the same purposes in mind as prior hearings.

II. N.C.G.S. 50-16.8(e), AS APPLIED TO A SUPPORTING SPOUSE WHO HAS COUNSEL OF RECORD AND WHOSE ADDRESS IS KNOWN TO THE COURT AND TO ADVERSE PARTIES, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In Boddie vs. Connecticut, 401 U.S. 371 (1971), the Court observed:

> "Our cases . . . establish that a statute or rule may be held unconstitutionally invalid as applied when it operates to deprive an individual of a protected

> right even though its general validity as a measure enacted in the legitimate exercise of state power is beyond question . . . [T]he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." Id., at 379-380.

This rule has been applied frequently to cases involving reasonable notice. For example, in Mullane vs. Central Hanover Bank & Trust Co., supra, the Court held that a statutory provision for notice by publication, although sufficient as to beneficiaries of a trust whose interests or addresses were unknown, was not sufficient as a matter of due process for known beneficiaries. Id., at 318. And in Covey vs. Town of Somers, 351 U.S. 141 (1956), the Court held that notice by publication in a foreclosure action, even though sufficient to provide a normal person with an opportunity for hearing, was not sufficient

where the defendant was a known incompeten. Id., at 146. Therefore it is eminently clear that a notice procedure, though generally valid, may fail to satisfy due process when applied to a particular individual or to a particular fact situation.

So if it is found that N.C.G.S. 50-16.8(e) is generally valid notwithstanding the fact that it authorizes deprivations of property interests without prior notice and opportunity to be heard, the statute must still be held invalid as it applies to the appellant herein and to the facts of this case. The particular question presented here is whether N.C.G.S. 50-16.8(e), in dispensing with notice requirements, is constitutionally defensible when the appellant had local counsel of record and when appellant's specific location was known to the court and to all adverse parties.

As was demonstrated in Point I(B), supra, in insisting upon adherence to a statute which dispenses with notice even when the supporting spouse has counsel of record who could easily be notified of a hearing to determine alimony pendente lite, the State "spites its own articulated goods" in judicial efficiency and integrity. Cf., Stanley vs. Illinois, supra, at 652-653. In such cases a refusal to notify counsel of record promotes uninformed judgments without promoting any need for prompt action. Furthermore, as was demonstrated in the trial court, refusal to notify counsel of record encourages mistrust and animosity between the supporting spouse and his counsel because of the failure of the client to understand why his attorney was not at the hearing when the decree was entered. (A pp 44-45)

Moreover, the dependent spouse's

desire to secure alimony promptly is better served by requiring counsel of record to be notified of the hearing. An order to pay alimony is of no practical effect until it is served upon the supporting spouse, unless the dependent spouse initiates collection procedures enumerated in N.C.G.S. 50-16.7. Therefore the dependent spouse must wait until the supporting spouse receives the order. On the other hand, if the supporting spouse's counsel of record is notified prior to the hearing, the supporting spouse could be charged with the knowledge his attorney has of the matter and a long delay between order and receipt would thus be avoided. Thus there is absolutely no interest of the dependent spouse which is served by refusing to notify the supporting spouse's counsel of record.

The North Carolina Court of Appeals was of the opinion that if notice is not

required to be served on a party, neither need it be served on his counsel of record, citing N.C.G.S. 1A-1, Rule 5 (Brief App.B, p 5a). But that response does not address the argument presented here: that due process required that appellant be served with notice unless circumstances would make such service impossible or unduly impractical, in which case due process would require that his counsel of record be served with notice. In other words, the court is under a duty to fulfill due process requirements by taking the next best course of action where the most desirable course of action cannot be taken. The next best course of action that could have and should have been taken here was to notify appellant's counsel of record. The propriety of such an approach is in full accord with the mandates of Rule 5 of the North Carolina Rules of Civil Procedure. Indeed, Rule 5

(b) provides that a party be notified through counsel of record unless the court directs otherwise, so the fact that appellant may have been outside of North Carolina at the time the motion was made for alimony pendente lite is largely irrelevant to the question of whether his counsel of record should have been notified in accordance with due process requirements.

The record also clearly shows that the trial court was aware of appellant's location in Springfield, Virginia, having made a finding of fact to that effect, (A p 40), as was appellee, since she had on previous occasions served various pleadings and other documents on appellant at his Springfield address. (R pp 9-11) So there can be no question but that the court and the appellee knew appellant's address in Virginia. Notification to him,

by regular or certified mail, of the pending motion for alimony pendente lite would have presented appellee with no unreasonable burden, nor would it have presented any undue delay. Due process touches upon what is reasonable under the circumstances, Cafeteria & Restaurant Workers Union vs. McElroy, 367 U.S. 886, 895 (1961), and in this case notification by mail to the appellant would have been eminently reasonable.

Accordingly, N.C.G.S. 50-16.8(e), in its application to the appellant and to the facts of this case, presents two distinct constitutional infirmities. It does not provide for notice to counsel of record in those cases where notice to the supporting spouse would be impractical, and it does not provide for reasonable notice to the supporting spouse where notice would be practical, even where the supporting

spouse has allegedly abandoned the dependent spouse and left the state. Therefore, N.C.G.S. 50-16.8(e), as applied to deprive appellant of property interests without adequate notice and opportunity to be heard, violates the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

Based on the foregoing considerations, appellant respectfully requests that the judgment of the North Carolina Court of Appeals be reversed and the case be remanded with directions to vacate or dissolve the order for alimony pendente lite and attorney's fees entered on March 1, 1978.

Respectfully submitted,

John F. Morrow,
Attorney for appellant

CERTIFICATE OF SERVICE

The undersigned attorney for appellant hereby certifies that he served required copies of the foregoing brief of appellant on attorney for appellee this the 25 day of February, 1980.

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APPENDIX A

Uniform Marriage and Divorce Act 201:0003

Section 304. [Temporary Order or Temporary Injunction.]

(a) In a proceeding for dissolution of marriage or for legal separation, or in a proceeding for disposition of property or for maintenance or support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, either party may move for temporary maintenance or temporary support of a child of the marriage entitled to support. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested.

(b) As a part of a motion for temporary maintenance or support or by independent motion accompanied by affidavit, either party may request the court to issue a temporary injunction for any of

the following relief:

(1) restraining any person from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities of life, and, if so restrained, requiring him to notify the moving party of any proposed extraordinary expenditures made after the order is issued;

(2) enjoining a party from molesting or disturbing the peace of the other party or of any child;

(3) excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result;

(4) enjoining a party from removing a child from the jurisdiction of the court; and

(5) providing other injunctive relief proper in the circumstances.

(c) The court may issue a temporary restraining order without requiring notice to the other party only if it finds on the basis of the moving affidavit or other evidence that irreparable injury will result to the moving party if no order is issued until the time for responding has elapsed.

(d) A response may be filed within [20] days after service of notice of motion or at the time specified in the temporary restraining order.

(e) On the basis of the showing made and in conformity with Sections 308 and 309, the court may issue a temporary injunction and an order for temporary maintenance or support in amounts and on terms just and proper in the circumstance.

(f) A temporary order or temporary injunction:

(1) does not prejudice the rights of the

parties or the child which are to be adjudicated at subsequent hearings in the proceeding;

(2) may be revoked or modified before final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under Section 316; and

(3) terminates when the final decree is entered or when the petition for dissolution or legal separation is voluntarily dismissed.

GENERAL STATUTES OF NORTH CAROLINA §1A-1,
Rule 5

Rule 5. Service and filing of pleadings and other papers.

(a) Service -- when required. -- Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) Service -- how made. -- A pleading setting forth a counterclaim or cross-claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or his attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or

to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.
(1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1.)